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## CONSTITUTIONALITY OF SEDITION LAWS.

THE excitements incident to our present conditions have again brought forward for consideration the old questions of how far a free government may suppress free and full expression of disapproval of the government, and should the forces of government move against a discontented element of the people, whose discontent has perhaps been expressed in words of dangerous import, but who have not as yet made use of any physical force in carrying their threats and designs into execution.

Our political theory takes as its axiom the principle that governments instituted among men derive *all* just power from the consent of the governed, and may, therefore, be by them at any time altered, amended or abolished. If we are not to abandon the chief article of the Jeffersonian faith, we must realize that if the people are free at any time to alter, amend or abolish their government, then, in the very nature of things, there can be no limit upon the right of each citizen to propose and to advocate alterations and amendments, unless indeed, he attempts to effect these changes by force, and that even in this latter case, since the end sought—that is, the alteration of the government—is lawful, and only the means used—that is, the force—is unlawful, sound policy demands that no action be taken until it becomes clearly evident that the line of demarcation has been passed.

These considerations seem to have been clearly in the minds of the framers of the Constitution, and to have been recognized therein in terms as clear and explicit as words can frame. In Article 3, Section 3, treason was defined. The question whether or not the definition of treason as contained in the Constitution

was intended to exclude the possibility of Congress' punishing treasonable or seditious conspiracy appears never to have been directly passed upon by the Supreme Court of the United States. Twice at least, prior to the recent war, Congress attempted to define the crime of sedition or treasonable conspiracy; both laws were enacted in times of great popular excitement and unrest—one, the Sedition Law of 1798, and one, an Act approved July 31, 1861. The latter law punished any conspiracy to levy war against the United States, and was, of course, aimed at the numerous citizens of States which had not seceded, whose sympathies might prompt them to aid the Confederacy to effect the secession of their States. The constitutionality of this law never came squarely before the Supreme Court. Such judicial utterance as there is on this law, assumes its constitutionality, but the authorities extant are for the most part charges to grand juries.[1] Apparently no serious attempt was made to enforce this law. Lincoln, even when disaffection was rife, relied on the ability of his administration to command the confidence of the people of the northern and border States rather than on its power to crush opposition to his policies.

The Sedition Act of 1798 likewise never reached the Supreme Court. It expired by its own limitation in 1801 before Marshall was appointed to the bench, and, therefore, before the Supreme Court had asserted the doctrine that acts of Congress in conflict with the Constitution were not binding upon the Judicial Department. It was, however, by all the Democrat-Republican leaders regarded as unconstitutional. Jefferson, explaining why he had, immediately on assuming office, pardoned all persons convicted under it, wrote, "I discharged every person under punishment or prosecution under the Sedition Law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." [2] Even the wiser heads among the Federalists disapproved the act. Hamilton was among the first to see and denounce its evils.[3] Marshall, while a candidate for Congress,

[1] 1 Bond 609, 30 Fed. Cas. 1039.
[2] Letter to Abigail Adams, July 22, 1804.
[3] People *v.* Croswell, 3 Johns. Cas. (N. Y.) 336, 365.

expressed disapproval of the act, although he avoided any discussion of the right of Congress to pass it.

In the history of our nation, prosecutions for treason against the United States have been rare. Reported cases are in fact limited to the cases arising out of the Burr Conspiracy and several of lesser moment arising out of the Whiskey Rebellion in Pennsylvania. In all of these overt acts were alleged. Therefore, it is yet an open question whether the definition of treason as given in the Constitution, was intended to be complete and to exclude the possibility of Congress' declaring criminal any seditious or treasonable conspiracy which has not extended to overt acts.

The definition of treason had long attracted the attention of English jurists, and indeed, the constitutional definition was taken from the statute of 25 Edward III. This statute declared certain specific acts to be treason.[4] All of these acts are certain definite offenses against the person of the sovereign or his immediate family, except the following: (1) Levying war against the king in his realm; (2) Adhering to the king's enemies in his realm or elsewhere; (3) Counterfeiting the Great Seal; (4) Counterfeiting the king's money; (5) Taking of the life of certain chief officers of state. All of these are offenses which from their nature could be committed only by overt action. Coke says that so great was the satisfaction of the people with this statute which rendered the crime of treason certain and definite, that the Parliament by which it was established, was called "Parliamentum Benedictum," and the same writer says that the statute had been held only second to the Magna Carta as a safeguard of liberty. Blackstone, commenting on the benefits of this statute, says: "As this is the highest civil crime, which (considered as a member of the community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of treason be undeterminate, this alone (says the president Montesquieu) is sufficient to make any government degenerate into arbitrary power." [5] The great advantage of the statute in question was that it limited treason to overt acts, thereby avoiding the danger that men would be prosecuted as traitors for de-

[4] 3 COKE'S INSTITUTES, ch. 1. [5] 4 BL. COMM. 75.

signs and conspiracies of which clear proof is nearly always impossible, and which are peculiarly subject to misconstruction. The wise policy of this statute was not always followed in English history. Many special acts defined constructive treasons and verbal treasons, such as the statute of Henry VIII, which made it treason to doubt the king's claim to be head of the church; and a statute of Elizabeth which made it treason for any native born subject to receive ordination under the authority of the Roman Catholic Church. It was at all times, however, well established that under the statute of Edward III no conviction could be had for conspiracy unless there was war levied. Coke says: "A compassing or conspiracy to levie war is no treason for there must be a levying of war *in facto*. But if many conspire to levie war, and some of them do levie the same according to the conspiracy, this is high treason in all, for in treason all be principals, and war is levied." [6] Blackstone quotes on this point an opinion of all the judges given to Charles I to the effect "that though words were as wicked as might be, yet they were no treason, for unless it be by some particular statute no words will be treason."

The above authorities show what was the state of the law when the Constitution was drafted. Its framers were acutely conscious of the manifold mischiefs and abuses which had attended the enforcement of the various special acts which had attempted to reach treasonable words and conspiracies, and in framing the Constitution, they evidently designed to guard against such legislation. Express power was given to Congress "To provide for the punishment of counterfeiting the securities and current coin of the United States." [7] The crime of counterfeiting, while included in the statute of Edward III, was by some writers said not to have been treason by the common law, and was also punishable under special acts. It seems that with this in view the framers of the Constitution separated this offense from treason proper, and conferred on Congress the elastic power to provide for its punishment.

In the matter of treason itself, they were more definite. Section 3 of Article 3 of the Constitution defines treason completely:

[6] 3 COKE'S INSTITUTES, ch. 1, p. 10.

[7] Constitution of the United States, Art. 1, § 8.

> "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

A comparison of this definition with the statute of Edward III shows clearly that the framers of the Constitution were adopting in part the earlier statute and were carefully excluding from it any acts whatsoever, unless the acts amount to a levying of war, or adherence to the public enemy. Neither of the acts is possible until there is an actual state of war. The subject of treason is further dealt with in the Constitution in Section 3 of Article 3:

> "Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted."

This provision supplements and completes the provision above given. The crime of treason has been fully defined and the power of Congress is limited to declaring the punishment. There are only three express grants to Congress of power to enact penal statutes. Congress is given power to *define* and punish piracies and felonies committed on the high seas, and offenses against the law of nations, and to *provide for the punishment* of counterfeiting the securities and current coin of the United States;[8] but the phraseology is deliberately changed in the reference to treason.

The words used in the constitutional definition had a fixed and known meaning. They had been construed in a multitude of cases and commented on by text writers in every period of the development of the common law. Like the phrase "due process of law," they were a set phrase in English jurisprudence, and the meaning attached to them by Coke and Blackstone was adopted without question by Marshall in the trial of Aaron Burr.[9] It is evident, therefore, that the Constitution leaves no opportunity to Congress to enlarge or limit the definition of treason, except in so far as it may be divided into degrees, declaring different punishments for different degrees.

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[8] Constitution of the United States, Art. 1, § 8.

[9] 4 Cranch 469, 476.

If Congress has no power to enlarge the constitutional definition of treason, can Congress define and punish as sedition acts which would not be criminal except in so far as they tend to incite or are the prelude to acts which would amount to treason? It is interesting to note that in neither Coke nor Blackstone is there mention of such an offense as sedition or treasonable conspiracy. Treason differed from other offenses in this—that while other common law crimes were aimed directly at the person or property of the subject and only indirectly at the peace and dignity of the king, treason aimed directly at the person of the king on the maintenance of his government; and all acts done in pursuance of such design, if punishable at all, were punishable as treason. The first section of the statute of Edward III defined as treason the "compassing or imagining of the death of the king, the queen, his wife, or his heir apparent;" therefore, a conspiracy to accomplish the death of the king, as opposed to mere defeat or overthrow of his government, were probably within the statute; but no conspiracies, not aimed at the sovereign's person, nor utterances were treason until there was an actual levying of war; and such utterances or conspiracies could amount to no other crime unless they were aimed at some person or persons in particular, and not at the existence of the government.

Therefore, by the word "treason," the framers of the Constitution must have meant all acts or attempts which are aimed at the defeat or overthrow of the government of the United States, and not at the person or property of any citizen; and Congress can declare a punishment for such acts, only when they amount to levying war against the United States or giving aid and comfort to their enemies. If we were to assume that Congress has an implied power to define and punish as sedition any conspiracy entered into with treasonable purpose, or utterance which tended to incite rebellion, we would reach the astounding conclusion that Congress had implied power to punish under one name an act which it was expressly forbidden to punish under another. Thus, if Congress should enact "That if any two or more persons shall conspire to levy war upon the United States or to overthrow by violence the government thereof, such persons shall be guilty of *treason,*" the law would be utterly void, but if the last word were

stricken out and "sedition" inserted, the law would be constitutional, although the punishment of the two crimes were identical. The provisions of the Constitution are applicable to things, not names, and if Congress has power to define and punish sedition, the above quoted sections concerning treason are so many idle words, for Congress may classify as sedition every act which it is forbidden to classify as treason, and may attach to the two offenses the same penalty.

Since treasonable designs which do not amount to overt acts are usually manifested by the writings and speeches of the accused persons, the constitutional limitations on the power of Congress to define and punish treason are closely related to the constitutional protection of the right of free speech. This right was guaranteed by the First Amendment:

> "Congress shall *make no law* respecting an establishment of religion, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the government for redress of grievances." (Italics ours.)

In considering the meaning of this amendment and its effect in binding the power of Congress, reference to the circumstances which attended its adoption is necessary. When the Constitution was first submitted to the States for ratification or rejection, one of the chief defects pointed out by those who opposed its adoption was the fact that it contained no bill of rights. This objection, along with others, seemed sufficient to prevent its adoption. In Virginia especially, it was opposed by such men as Mason, author of the Virginia Bill of Rights, and Henry; and for a long time Virginia's action was in doubt. Madison and Hamilton pointed out that since the Federal Government could exercise only such powers as were expressly or by necessary implication granted to it, Congress would have no power effectual to invade the cherished liberties enumerated in the Bill of Rights and, therefore, express restriction was superfluous. So strong, however, was the opposition, that to allay all fears and make assurance doubly sure, the proponents of the Constitution pledged themselves to coöperate in the adoption of amendments limiting the Federal power, and accordingly shortly after the Constitution became effective,

the first ten amendments were adopted, following in substance the provisions of the Virginia Bill of Rights.

From the beginning, much uncertainty has existed upon the subject of the true meaning of the first amendment. Justice Story was of opinion that the amendment was intended to prevent Congress from restraining publication, or utterances, but did not prevent punishment because of the matter published or uttered.[10] On the other hand, Tucker, the most learned of the Democrat-Republican commentators on English common law, held that the amendment was intended to prevent not only previous restraint, but subsequent punishment.[11] If the amendment is to be considered as going no further than to prevent restraints upon publication, it is obvious that it accomplishes nothing of value. It is physically impossible to restrain speech, and difficult, if not impossible, effectually to restrain publication. Restrictions must of necessity be enforced by penalties imposed upon those who have spoken or printed things prohibited; and it would be but a small protection to liberty to guarantee to a citizen freedom to speak and print what he pleases, free from interruption, but to subject him to punishment for having done so. Under such a state of law, freedom of speech would be worthless except to those whose zeal made them willing to accept martyrdom. On the other hand, to hold that the right of free speech means that an individual may speak or print whatever he will, regardless of consequences, is to hold that one man has a natural right to slander another.

Viewed as a Federal question, the meaning of the amendment is clear, and it seems that the view of Tucker is the sound one. The provision of the Virginia Bill of Rights was:

> "That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments, and every citizen may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right."

This provision obviously left to the legislature freedom to define what constituted abuse of the right. The stricter words

[10] 2 STORY, CONSTITUTION OF THE UNITED STATES, § 1880 *et seq.*
[11] 2 TUCKER, BLACKSTONE, App. p. 28.

of the Constitution manifestly refer to the limited powers of the Federal Government, which had no power to define rights between man and man, or any direct power to regulate speaking or publication. If its laws operated on the question at all, they could do so only in so far as was necessary or convenient to the exercise of some other power. In contending that a Federal bill of rights was unnecessary, because of the limited powers of the general government, Hamilton had said,[12] "Why for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" Still such men as George Mason were unwilling to trust to this negative protection; they desired guarantees, clear and unambiguous, that upon this subject Congress should not legislate either directly or as an incident to any other power. The State governments could define and punish the abuse of the power, Congress should *make no law* touching the subject, and for this purpose the First Amendment was adopted.

The interpretation of the First Amendment had seldom been before the Supreme Court prior to its recent decisions under the Espionage Act. Such cases as had arisen had been of little interest. It has been held that this amendment did not prevent punishment as contempt of court words which were intended to incite disobedience to an injunction awarded in a pending cause.[13] This decision appeared eminently sound, for the First Amendment evidently intended to prevent legislation, and not to deprive courts of equity of their power to control pending causes. It has also been held that Congress had power to exclude lottery tickets [14] and obscene publications.[15]

The question of the power of Congress either directly or indirectly to prohibit the free expression of opinion on public questions, or to suppress or punish criticism or denunciation of existing conditions or institutions had never been brought before the Supreme Court. In the above cases, the Court has stated that the First Amendment did not extend to every use of speech, but cautiously avoided saying what uses its provisions protected.

[12] THE FEDERALIST, paper 84.
[13] Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418.
[14] *In re* Rapier, 143 U. S. 110. [15] *Ex parte* Jackson, 96 U. S. 727.

The Espionage Act of 1917 contained many provisions similar to those of the Sedition Act of 1798. It dealt with many matters, such as the betrayal of military secrets, which were unquestionably within the constitutional definition of treason; it also prohibited under severe penalties any speech or writing that would cause insubordination in the military forces, obstruct recruiting, or the sale of bonds; and also went so far as to punish any defamatory or scurrilous writings concerning the form of government, or which would tend to bring the government or its officials into contempt. The first case under this law to reach the Supreme Court was Schenck *v.* United States.[16] Schenck, as one of the officers of the Socialist Party, distributed circulars which denounced the draft law. The circulars did not openly urge resistance or disobedience, but certainly might have made drafted men more likely to avoid their duty. The Supreme Court sustained Schenck's conviction and upheld the act. The opinion, however, fails to place any definite construction on the free speech clause of the Constitution. In Debs *v.* United States[17] and Frohwerk *v.* United States,[18] the Court again upheld the act. In all of these cases the essential facts were that the defendants had expressed disapproval of the course pursued by the United States, and had denounced the laws enacted for the national defense as tyrannical; but in none of them had resistance or even disobedience been directly urged, although it is probable, as suggested by the Court, that the speeches and writings were intended to provoke disobedience or resistance, but there was no evidence of a single act of resistance. The convictions were, therefore, solely for expressing disapproval of a course adopted by the government. If these cases are to be taken as precedents, to be followed in all times, Congress may declare that it shall be a crime to express disapproval of any law. The Court, however, limits the effect of these cases to speeches and acts in time of war. In Schenck *v.* United States, the Court says:

"We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would

[16] 249 U. S. 47.
[17] 249 U. S. 211.
[18] 249 U. S. 204.

> have been within their constitutional rights. * * * The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

In all of these cases the Court avoids saying what effect the First Amendment was intended to have, and indicates clearly that in times of war it has one meaning, in times of peace another,—*inter arma silent leges*. The Espionage Act was probably a salutary measure, and judged by the standards of expediency, the above decisions are good ones, but if we are not to abandon the constitutional guarantee of free speech altogether, the principle of those decisions should be strictly limited to a time of war. There is already some indication that the Court may do this. In the later case of Abrams *v.* United States,[19] Justice Holmes and Brandeis dissented from an opinion following the cases above cited. The last case was stronger than either of the earlier cases, for the defendant had urged insurrection as a means of preventing intervention in Russia. Holmes, who had written the opinion in the preceding cases, wrote the dissenting opinion in the Abrams case, in which he affirms that he still considers his former opinions sound, but he fails to point out any rational ground of distinction, except that in the instant case the defendant had desired only to prevent a war with Russia, which had not been actually begun, and also that the defendant was so obviously ignorant that it was impossible to imagine that his utterances were dangerous. In his dissent Justice Holmes clearly recognizes that his former opinions were not interpretations of, but judicial established exceptions to, the plain words of the First Amendment. "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrant making any exception to the sweeping command 'Congress shall make no law abridging the freedom of speech or of the press.'" The fact that the crime with which Abrams was charged was committed by printing and circulating leaflets on July 27, 1918, was apparently overlooked by the learned Justice, writing his opinion in November, 1919, and he considered that

[19] 40 Sup. Ct. 17 (Nov., 1919).

the construction of the Constitution should depend not merely on the conditions existing at the time of the offense, but also on the political conditions existing at the time of the trial.

The difficulty which the Court experienced in the above case and its apparent inability to formulate any judicial definition of the words "abridging the freedom of speech" is but one more evidence of the fact that our Constitution, adopted for a group of States, isolated from each other and forming distinct social and economic units, is inapplicable to a nation which for every purpose, except local police regulation, is a single unit, and, therefore, it is becoming impossible to construe the Constitution judicially. To construe a written instrument is to apply its provisions to the conditions which its framers had in mind. To apply it to conditions which could not have entered even into the dreams of the draftsman is impossible, and the attempt to do so is legislation, not interpretation. Therefore, under the process of construction, the Constitution is becoming more and more like that of England, a mass of precedents, which are to be followed in spirit rather than in letter. And the power of the Supreme Court is in the nature of a restricted power of veto, by which it annuls legislation which appears to be too great an innovation; but under which it will not interfere with legislative acts which appear reasonably in keeping with the demands of the times. It appears obvious that the framers of the Constitution did not intend to guarantee unlimited license of speech or of the press, free from any restriction; but it does appear that they intended such restraints to be imposed by the States and not by Congress. This was practicable in the early days of the Union. Speeches and writings could seldom have influence beyond State limits, and if spread beyond those limits at all, could be brought to the knowledge of a privileged few only, who could be trusted not to form hasty judgments. The danger, therefore, was local. If an agitator succeeded in raising a disturbance, it was only of local concern, unless the large body of the State was stirred, and in this last case, the States did not desire the action of Congress. To-day the reverse is true. A speech in California to-day is as effective in Boston tomorrow as if it had been delivered on

Boston Common. If any control is to be exercised at all, that control must be national. It is, therefore, well that the Court wrenched authority a little.

The Court has declared that construction of the First Amendment is a matter of proximity and degree, and will depend upon the conditions existing at the time. Consideration of the conditions which might be said to warrant the suspension of the right of free speech, raises a political, not a judicial question; and it is, therefore, reasonable to expect that in the future the Court intends to allow Congress to legislate upon the subject of the freedom of speech, subject to some general supervision by the Court in the event that legislation appears hasty, or plainly not adaptable to the needs of the time. However, the legislative branch, in view of our long established practice of permitting full and unrestricted speech, should remember that it bears jointly with the judiciary the responsibility of protecting those fundamental rights enumerated in the Constitution.

If the framers of the Constitution dreaded laws that might make treasonable conspiracies punishable, and laws that might abridge free discussion of all public questions, it is well before forsaking this position to bestow attention on the reasons which impelled them to limit and define the power of Congress in this respect.

The main considerations which may be argued against the exercise of legislative power are: First, Will the law curtail any fundamental right? Second, Will the law prove so uncertain in application as to cause the enforcement of it more productive of miscarriage of justice than of just convictions? Third, Will the law remedy the evil at which it is aimed?

Upon the first head, little need be said in favor of absolute freedom of utterance so long as that utterance is not directed at the reputation or right of an individual. In government derived from the people, the right freely to condemn all public measures and institutions is fundamental. It must exist as a condition precedent to all free government, for if the "majority of the community hath an indubitable, inalienable and indefeasible right to reform, alter or abolish 'their government' in such

manner as shall be judged most conducive to the public weal," each citizen has a right to lay before that majority a proposal for reform, alteration or abolition, however far-reaching or drastic, and they, and they only, can decide whether such proposal be sound or desirable. In times of pressing public peril, this right may be suspended for a period. To limit permanently is to deprive ourselves of our means of self-government.

It is impossible to define by legislation dangerous doctrines, and if defined at all, they must be in such general terms as to leave to the tribunal which applies the law full opportunity to punish any expression with which it disagrees. Every new office created, and every act passed is *pro tanto* a change of our form of government. Can we prohibit men to advocate far-reaching changes, and permit them to advocate slight ones? If so, who shall decide where lies the line? If a man may not denounce a draft law because thereby he may cause some men to evade registration, may he denounce an excess profit tax bill, when that may cause some men to file a false return?

In the case of conspiracies, the objection lies in the inevitable weakness of the administration of justice. Such charges must generally be proved by independent evidence, and the confessions of accomplices. It is so natural for discontented men to speak more than they mean, and to plan what they dare not execute; such conspiracies are always greater in the mouths of their authors than they will ever be in action, and most of them, if left alone, would end in the cellars where they began. When discovered, however, their discoverers usually make them appear as dangerous as possible, and public feeling aroused to the highest pitch usually mistakes vastness in accusation for certainty in proof. It seems that it is wisest to wait until there is some overt act which can be proved by the testimony of two witnesses.

Single agitators may be punished for utterances and ringleaders of conspiracies may be detected, but if the malcontents are at all numerous, it is impossible to suppress all. Therefore, discontent, which would, if undisturbed, end itself in words, if dealt with by drastic measures, is driven to secret efforts which

attract adherents from that very love of the secret and the forbidden which is so deeply ingrained in all, especially in the ignorant; and ideas which, if advanced publicly, would provoke laughter, become ideas almost sacred when breathed in secret.

Enemies of established government, whether right or wrong, commonly believe themselves to be in the right, and their followers look upon them as prophets. Therefore, they have little fear of punishment. If they are punished for their belief, they acquire the power of martyrs, while if they are opposed only with argument and education, they usually lose all influence in a short while.

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